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in the

Supreme Court

of the

United States

OCTOBER TERM, 1970

No. 1579

HARTFORD ACCIDENT AND
INDEMNITY COMPANY,

Petitioner,

vs.

EASTERN AIR LINES, INC.,

Respondent.

BRIEF OF EASTERN AIRLINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF CASE

The petition for writ of certiorari seeks review of the judgment of the Court of Appeals for the Fifth Circuit which affirmed the District Court's judgment for Respondent, Eastern Air Lines, Inc. (Eastern).

Eastern brought this action to recover on a performance bond written by the Petitioner, Hartford Accident and Indemnity Company (Hartford). On September 18, 1967, Eastern and Jet Power, Inc. entered into a contract whereby Eastern agreed to sell and Jet Power agreed to buy twenty-nine (29) Lockheed Constellation aircraft and all of Eastern's spare engines and complete inventory of spare parts peculiar to the aircraft. On October 4, 1967, Hartford wrote a performance bond in which it guaranteed the performance by Jet Power of its contract with Eastern.

The cause was tried by the Court after each party, by stipulation, waived trial by jury.

Eastern contended and the Court found that Jet Power breached the contract and that Eastern sustained total damages of $259,568.89. (App. A-3 and A-5 to Petition). The Court found that Hartford was obligated to pay Eastern its damages. (App. A-5 to Petition).

The Court specifically found that the goods proffered by Eastern conformed with the description in the contract and that the contract did not constitute "a sale by technical description." (App. A-4, A-7 to Petition). In doing so, the Court found that the contract was governed by the "Uniform Commercial Code, Florida Statutes adopted January 1, 1967" and awarded damages in accordance with those Florida Statutes. (App. A-8 to Petition).

The Fifth Circuit in a per curiam decision affirmed stating:

> "We have carefully reviewed the record and the contentions of the parties as well as the find-

> ings of fact and conclusions of law of the District Court. We believe that there was no error in the judgment below. The District Judge correctly held that the parties entered into a clear and unambiguous contract, that the parties understood that the listings of the types of parts stocked by Eastern and the quantity thereof did not require further technical description. It is likewise clear from the record that the parties understood and stated in their written contract that the exhibit attached to the contract, which listed the spare parts inventory, 'may or may not reflect the actual inventory as of the date of this agreement.'
>
> "We agree with the Trial Court that Jet Power wrongfully breached the contract, failed in its obligation to take delivery of the aircraft and parts for which it had contracted, and accordingly that Eastern is entitled to recover damages in the amount found by the District Judge. . . ."

QUESTIONS PRESENTED

Eastern does not believe that the Petition of Hartford presents a good faith question and Eastern further believes and contends that the Petition on its face shows that it was brought solely for the purpose of delaying proceedings on the judgment of the lower Court in violation of United States Supreme Court Rule 56.

Therefore, Eastern believes that the following two questions should be decided:

(1) Did the lower Courts apply Florida law?

(2) Was the Petition for Certiorari filed solely for the purposes of delay and should damages at the rate of ten percent (10%) in addition to interest be awarded Eastern pursuant to Supreme Court Rule 56?

ARGUMENT

I.

THE LOWER COURTS DID APPLY FLORIDA LAW

The purported basis for the Petition is that the District Court and the Fifth Circuit did not comply with United States Code Title 28 §1652 and the decision of this Court in **Erie R.R. vs. Tompkins,** 304 U.S. 64 (1938) in that they "declined to follow the pertinent law of Florida and frustrated the basic Legislative purpose that under the adopted Uniform Commercial Code on sales a purchaser shall receive the goods bargained for and the goods shall conform to those described by the seller." (Petition p. 8). Specifically Hartford contends that §672.2-313 Florida Statutes had to be applied to this cause.

The most cursory review of the decisions by the lower Courts shows clearly that they did comply with United States Code Title §1652 and **Erie R.R. vs. Tompkins,** supra, and did apply and follow Florida law and specifically the Uniform Commercial Code, which was effective in Florida January 1, 1967. The District Court in paragraph 10 of its Conclusions of Law states:

> "10. The measure of damages herein were in accordance with the provisions of the Uniform Commercial Code, Florida Statutes, adopted January 1, 1967, which governs the contract, and the plaintiff is entitled to recover the sum of $259,-568.89 at the rate of six (6%) percent per annum." (App. A-8 to Petition).

It specifically held in paragraph 6 of the Conclusions of Law that on the facts the contract did not "constitute a sale by technical description," obviously referring to Hartford's defense under Florida Statute §672.2-313.

The Fifth Circuit in its decision was obviously referring to Hartford's defense under Florida Statute §672.2-313 in its discussion of the case.

The lower Courts applied Florida law—Hartford's objection is simply that based on the facts the lower Courts applied the portions of the Florida statutes cited by Eastern and not those cited by Hartford.

II.

THE PETITION FOR CERTIORARI WAS FILED SOLELY FOR THE PURPOSES OF DELAY AND DAMAGES AT THE RATE OF TEN PERCENT (10%) IN ADDITION TO INTEREST SHOULD BE AWARDED EASTERN PURSUANT TO SUPREME COURT RULE 56

As was discussed above, the lower Court decisions show on their face that the Courts did apply Florida law and the alleged basis for the Petition is specious.

This Petition is not within the purview of Rule 19 of this Court (Considerations Governing Review on Certiorari) nor is it even arguably within the purview of Rule 19. This Petition was filed solely to delay proceedings on the judgment of the lower Court, i.e., to delay paying the judgment of $259,568.89.

With effective interest rates running as high as eleven and one-quarter percent (11¼%), Eastern has been damaged by Hartford's petition, which has delayed the payment of the judgment. Moreover, the filing of such frivolous petitions work a hardship on both this Court and litigants who have real and vital issues that need resolution.

The application of Rule 56 to this Petition would both compensate Eastern for its damage and discourage further delaying tactics by this Petitioner and others. Indeed, unless Rule 56 is applied, it would seem probable that Hartford will further delay by requesting reconsideration.

An assessment of damages at the rate of ten percent (10%) would (1) prevent Hartford from profiting by this delay; (2) penalize it for the delay; and (3) discourage further delay. An assessment of damages at the rate of five percent (5%) would merely prevent Hartford from profiting by the delay.

CONCLUSION

On its face, the Petition shows that it was brought solely for purposes of delay in violation of this Court's Rule 56. Therefore, the petition for writ of certiorari should be denied and damages at the rate of ten percent (10%) in addition to interest, should be awarded upon the amount of the judgment.

Respectfully submitted,

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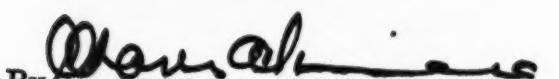
By 

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Charles A. Kimbrell, attorney for respondent and a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this 5-2 day of May, 1971, mailed, First Class postage prepaid, three copies of Brief of Eastern Air Lines, Inc., in Opposition to Petition for Writ of Certiorari to FREED & FREED, 19 West Flagler Street, Miami, Florida, 33130, WALTON, LANTAFF, SCHROEDER, CARSON & WAHL, DuPont Building, Miami, Florida 33131 and RICHARD M. GALE, ESQ., 518 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130, Attorneys for Petitioner.

Charles A. Kimbrell